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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 118

Between

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald of the trusts hereinafter described, Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, infants, by William McClelland, their guardian *ad litem*,

Plaintiffs,

and

GERALD PURCELL FITZGERALD, individually and as Trustee of the trusts hereinafter described; CHARLES E. LENHART, as trustee of the trusts hereinafter described, GERALD PURCELL FITZGERALD and CHARLES E. LENHART, partners as Fayette Coke Company and Shamrock Supply Company, CHARLES E. LENHART, Manager of Fayette Coke Company and Shamrock Supply Company,

Defendants.

BRIEF FOR APPELLEES

W. W. PARSHALL (now deceased) and R. J. ARNETT, two of Trustees for Appellants and others and A. A. THOMPSON (now deceased) and JOHN S. HARAH, Administrator of G. S. HARAH, deceased, former Trustees for Appellants.

DEAN D. STURGIS,
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Uniontown, Penna.

and

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STATEMENT OF THE CASE.

Appellant, Lida, Princess of Thurn and Taxis, in 1899 was married to Gerald Purcell Fitzgerald, a resident of the Isle of Waterford, in Ireland (11). In 1906 the husband and wife instituted divorce proceedings against one another and by agreement dated December 6, 1906 (12) executed by them, Josiah V. Thompson and Charles E. Lenhart, Fitzgerald covenanted that after dissolution of the marriage, he would pay to Thompson, Lenhart and himself as trustees

(1) So much of his share of the annual profits accruing from Fayette Coke Company and Shamrock Supply Company, partnerships operating in Fayette County, Pennsylvania, and composed of Fitzgerald and Lenhart, as would yield an annuity of $15,000.00 per annum for three years and thereafter $20,000.00 per annum to be paid to the wife for life (12);

(2) One-third of his share of the annual profits to be invested until there should accumulate the sum of $300,000.00, one-half of the income therefrom to be paid to the wife for life; the other half either to accumulate or to be expended for the benefit of the children; or the trustees in their discretion might pay the entire income to the wife until the eldest child attained the age of 21 years; as each child became 21 years, he was to receive his share of the income as of right, and on the death of the wife and after the youngest child attained the age of 21, the trustees were to distribute the remainder of the fund and all accumulations thereon among the surviving children (12, 13).

The agreement provided that in the event of the death or resignation of any of the trustees, the two re-

maining should appoint a successor, or on their failure to do so, either of them or the wife should have the right to petition the Court of Common Pleas of Fayette County, Pennsylvania, to fill the vacancy (14). The wife agreed to relinquish all rights of dower and alimony (14) and the agreement contained certain provisions for the custody and control of the children (15).

The marriage was dissolved by Act of Parliament in 1907 (28) and the stipulated payments were duly made until 1910 (59). In that year a Bill in Equity was filed in the Fayette County Court, hereinafter referred to interchangeably with the Supreme Court of Pennsylvania as the State Court, by Thompson as trustee (10), the wife and three children by their guardian *ad litem*, against Fitzgerald and Lenhart as trustees, Fitzgerald individually, and the Fayette Coke Company and Shamrock Supply Company, asking the Court to remove Fitzgerald and Lenhart as trustees, to declare and establish a lien upon the properties of the companies in order to secure the payment of the sums provided for in the agreement, to construe the trust Agreement and instruct the trustees accordingly, to require Fitzgerald and Lenhart, as members of the partnerships, to account for and pay into the Trust, or to a sequestrator or receiver to be appointed by the Court, the proper share of Fitzgerald's profits and make such subsequent accountings as might be necessary during the term of the Agreement, and to restrain defendants from alienating or encumbering any of the properties of the companies (31, 32). Answers were filed to the Bill. That of Fitzgerald asked by way of counter-relief that the

Agreement of 1906 be declared null and void, that Thompson be ordered to account to the Trust for monies received by him and that he be removed from his office as trustee of the fund for the children (41). The suit culminated in 1911 in a decree which—affirmed on appeal by the Supreme Court of Pennsylvania, 233 Pa. 242, writ of error dismissed, 222 U. S. 555—ordered defendants to pay amounts then remaining due under the Agreement, adjudged the payments stipulated in the Agreement to be a lien on Fitzgerald's interest in the real estate owned by Fayette Coke Company, removed Fitzgerald from his office as trustee, directed him to account for and pay over to the trust all sums in his hands held as trustee and restrained him from alienating or encumbering his interest in the property of the companies until the sum of $300,000.00 should have accumulated in the fund for the children (92-94).

In the place of Fitzgerald, William M. Thompson was appointed trustee by Thompson and Lenhart; he resigned in 1915 and William W. Parshall was appointed by the Court of Common Pleas of Fayette County in his stead (5). In the same year, Josiah V. Thompson, Lenhart and Parshall, the then trustees, filed a petition with the Court of Common Pleas of Fayette County, alleging that disputes had arisen between them and Fitzgerald with regard to a proper construction of the Agreement as to the profits of Fayette Coke Company (94-95), and that an agreement had been reached whereby Fitzgerald was to assign to the trustees his interest in the sinking fund of that company, and also to pay to them certain additional sums during the period of seven years aggre-

gating the sum of $400,000.00, these payments to be secured by a mortgage to the trustees on Fitzgerald's undivided interest in the real estate of the Fayette Coke Company. The payments were to be invested by the trustees and the net income together with the interest on the mortgage, was to be applied to the payment of the wife's annuity, and upon her death the $400,000.00, or such part thereof as had then accumulated, was to be returned to Fitzgerald, and the mortgage satisfied. The petition prayed the court to modify the decree of 1911 so as to permit the new agreement to become effective (98). Accordingly the court entered such a decree (99-101).

The fund of $400,000.00 was directed to be invested and reinvested by this decree, and the income realized therefrom used to pay to the wife the annuity of $20,000.00 in lieu of the arrangement under the agreement and former decree which simply required the trustees to collect from the Fayette Coke Company the sum of $20,000.00 annually and pay it over to the wife. The fund of $400,000.00 was completely paid into the hands of the trustees in 1925.

In 1918 the resignation of Josiah V. Thompson (5) and in 1919 that of Lenhart was presented to the state court and it was ordered that they be discharged from further accountings (6). Their places were supplied by G. S. Haran and Andrew A. Thompson, these appointments being approved and confirmed by that court (6).

In 1925 the trustees, Haran, Andrew A. Thompson and Parshall, filed their First and Partial Account in the state court which was duly advertised and confirmed (6). On July 7, 1930, a Second and Partial

Account of the Trust was filed (7), this time by Parshall and Andrew A. Thompson as surviving trustees, Harah having died on April 23, 1930, and Robert J. Arnett was appointed to succeed Harah and his appointment was confirmed by the Court.

The present controversy had its inception with the filing of a Bill in Equity in the District Court of the United States for the Western District of Pennsylvania, hereinafter referred to as the District or Federal Court, on July 8, 1930, by Princess Lida of Thurn and Taxis, the original plaintiff who had remarried, a citizen of Hungary, together with her eldest son John, then a citizen of the State of New York, against Andrew A. Thompson, Parshall and Arnett, trustees, and the administrators of the estate of G. S. Harah, all citizens of Pennsylvania (122).

The Bill alleged that there was in the wife's Alimony Fund upwards of $456,000.00 and in the Children's Fund upwards of $315,000.00, both of these sums including undistributed income, that among the investments in the Alimony Fund were certain mortgages on which interest and principal were long overdue and which were alleged to be unfit investments for trust funds, improperly made by the trustees, that there were other securities in the trust which had caused losses, and that the trustees were mismanaging the Trust Estate, had failed to render proper accounts, and were not fit persons to act as trustees (124-126). The Bill prayed that the trustees be required to file an account, that they be removed as trustees, and that all trustees under the deed of trust be required to give bond with surety for the faithful performance of their duties (126). A motion to dis-

miss this Bill was promptly filed. The motion alleged as a reason for dismissal the previous proceedings in the Court of Common Pleas of Fayette County and its sole and exclusive jurisdiction. As the motion was addressed to the Bill and no reference was therein made to the proceeding in the Court of Common Pleas of Fayette County, that fact could not be considered and the motion was overruled (135). Thereupon the trustees filed an Answer alleging that the mortgages complained of were lawful investments, denied the allegations as to losses, mismanagement of the estate and failure to render accounts and declared that itemized statements of the funds had been furnished annually to the Princess, that an account had been filed and confirmed by the Fayette County Court in 1925, and that another account had been filed July 7, 1930, the day before the Bill was filed in the District Court, which account was awaiting confirmation by the Fayette County Court (139-150).

Thereafter nothing was done with the equity proceedings in the federal court for several years. In April, 1937, the appellants here filed an amendment to the Bill in the federal court (151-154), specifying certain bonds and mortgages in the Trust Funds which they assert were illegal investments, alleging that the amount of the funds invested in mortgages was too great and for the prayer of the original Bill asking for the filing of an account, there was substituted one that the trustees be required to restore the funds, that is, the monies lost by their alleged illegal and negligent conduct. To the Amended Bill the trustees filed an answer (155-159), stating that all the bonds and mortgages challenged by the appellants had

been included in the account filed in the Fayette County Court in 1925, or in the one filed in 1930, and further alleging that to the account filed in 1930 exceptions had been filed which were pending in the Fayette County Court, and that while losses had occurred in some of the investments, accretions on others more than compensated therefor (155-159).

On May 1, 1937, the trustees filed a petition in the Fayette County Court setting forth that the prosecution of the suit in the federal court constituted an interference with the sole and exclusive jurisdiction of the state court, and prayed for a decree restraining the Princess and her son John from further prosecuting the federal action (104-106). A rule to show cause why the restraining order should not be issued was allowed (107). The Princess filed answer alleging that the Fayette County Court never had control and possession of the trust funds, and that there was no controversy there pending when the Bill in Equity was filed in the District Court, that the accounts filed by the trustees were *ex parte* proceedings, and denying that the state court had exclusive jurisdiction over the subject matter of the suit in the federal court (107-113).

On June 29, 1937, the state court made the trustees' rule absolute and entered the decree enjoining the Princess and her son John from prosecuting the equity suit in the federal court (113).

On July 6, 1937, the Princess and her son John appealed to the Supreme Court of Pennsylvania, which court affirmed the decision of the Fayette County Court (329 Pa. 497; 198 Atlantic 58).

On the same day John Fitzgerald filed a petition in the United States District Court to restrain the trustees from proceeding further in the Court of Common Pleas of Fayette County (160-162). An Answer was filed by the trustees (162), and the District Court on September 18th made an order fixing a hearing "on the jurisdictional issue" for November 8, 1937, and meanwhile enjoined the trustees as prayed in the petition (166). On July 19, 1937, the trustees filed in the Fayette County Court a Third and Partial Account of the two funds in trust to which exceptions were filed (9).

On the same date that the Supreme Court of Pennsylvania handed down an opinion affirming the action of the Fayette County Court, to-wit, March 21, 1938, the United States District Court for the Western District of Pennsylvania handed down an opinion (Appendix A, appellants' petition for certiorari) in which it held that the action of the state court was an action *in personam* and not an action *in rem* or quasi *in rem* as was held by the Supreme Court of Pennsylvania. No findings of fact or final decree has ever been entered by the District Court.

Since the petition for the writ of certiorari was filed in this court, W. W. Parshall and A. A. Thompson, two of the then respondents, have died.

On February 16, 1931, exceptions to the Second and Partial Account of the trustees were filed by Gerald Purcell Fitzgerald, a brother of John, and son of the Princess Lida, in behalf of himself and all other persons beneficially interested in the trusts (8).

Similar exceptions were filed by him, for himself and all others interested, to the Third and Partial Ac-

count on August 17, 1937 (9). These exceptions were not printed as a part of the record when the case was before the Supreme Court of Pennsylvania..

Although it does not appear from the printed record filed in this court, some testimony had been taken by the Court of Common Pleas of Fayette County at the time the appeal was taken to the Supreme Court of Pennsylvania, and is on file in this court by virtue of the writ of certiorari granted.

Since the appeal was taken to the Supreme Court of Pennsylvania, additional testimony has been taken and the record closed. This additional testimony is not incorporated in the record as certified by the Supreme Court of Pennsylvania.

The exceptions filed in the Court of Common Pleas by Gerald, above referred to, embrace every objection contained in the Amended Bill filed by these appellants in the District Court of the United States.

ARGUMENT.

I.

THE DOCTRINE OF SOLE AND EXCLUSIVE JURISDICTION.

1.

What the Principle Is.

As a general proposition, it is safe to predicate that when a court acquires jurisdiction of the subject matter of a cause, its right continues until the matter is finally and completely disposed of, and no court of coordinate authority is at liberty to interfere with its action.

The necessity out of which the doctrine arises, its purpose, extent, application, restrictions, and incidents may be most conveniently gathered from authoritative opinions in which it is stated, and to define its full scope, operation and character, a number of these will be here quoted at some length:

"It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

Peck *et al.* v. Jenness *et al.*, 48 U. S. (7 Howard) 612 (624).

"The possession of the *res* vestes the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens

against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to Federal and State courts."

Farmers' Loan etc. Co. v. Lake St. Rd. Co., 177 U. S. 51 (61).

"The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this court. As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute."

Harkin v. Brundage, 276 U. S. 36; 72 L. Ed. 457 (460).

"It is settled that where a Federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court. Where the action is *in rem*, the effect is to draw to the Federal court the possession or control, actual or potential, of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the Federal court, already attached. The converse of the rule is equally true,—that where the jurisdiction of the state court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction."

Kline v. Burke Construction Co., 260 U. S. 226; 67 L. Ed. 226 (230).

"But if the two suits are *in rem* or *quasi in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our dual judicial system (citing cases), and to protect the judicial processes of the court first assuming jurisdiction (citing cases), the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."

Penn General Casualty Co. v. Penna., 294 U. S. 189; 79 L. Ed. 850 (855).

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application and not peculiar to the relations of the courts of the United States to the courts of the States; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over

the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the States and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the States of the Union."

Wabash Railroad v. Adelbert College, 208 U. S. 38 (54); 52 L. Ed. 386.

"If the state court had acquired jurisdiction, over the property by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well settled principles, often recognized and enforced in this court, there should be no interference with the action of the state courts while thus exercising its authorized jurisdiction. The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty."

Palmer v. Texas, 212 U. S. 118 (125); 53 L. Ed. 435.

In continuing Justice Day, after quoting as appears herein from Farmers' Loan & Trust Co. v. Lake St. Elec. Ry. Co., said (129):

"If this rule is not applied, a court of competent jurisdiction, which by the law of its own pro-

cedure has acquired jurisdiction of property, may find itself, as in this case, after final judgment maintaining its right over the property, at the conclusion of the litigation deprived of the subject-matter of the suit. Indeed, this case would be an apt illustration of that situation. The courts of Texas have sustained the right to the receivership, and have held it was only suspended pending the appeal, but when it comes to enforcing the right to administer the property, if the Federal receivership is maintained the court of original jurisdiction finds itself stripped of the property and the same being administered in another court, which acquired its dominion over the property after it had become subject to the state jurisdiction."

In that case the Circuit Court of Appeals said:

"In cases where a state court and a United States court may each take jurisdiction, the one which first gets jurisdiction holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted. If jurisdiction as to the property attaches, it is exclusive till it has wrought its function. No other court of concurrent jurisdiction has the right to interfere with the property within the custody and control of the court first obtaining jurisdiction. Taylor v. Taintor, 16 Wall. 366, 370, 21 L. Ed. 287; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390. This principle is recognized in authorities too numerous for citation as one which is essential to the dignity and authority of every court, and essential also to the comity which should control the relations between courts of concurrent jurisdiction. A federal court, in a case where the possession of the thing in suit is necessary to the granting of the relief sought, after it has assumed jurisdiction, issued a subpoena in equity, caused it to be served, set the cause down for hearing, and made an order appointing a receiver, would not permit a state court to interfere with its jurisdiction over the property embraced by the order. The whole power of the

federal government, if necessary, would sustain the court in maintaining its exclusive jurisdiction. The United States courts should willingly give the same exclusive effect to proceedings in a state court of concurrent jurisdiction that they claim for such proceedings in federal courts. The rules on the subject must be reciprocal otherwise they will not produce that concord and harmony that is so essential to the effective and satisfactory enforcement of the law."

State of Texas v. Palmer, 158 Fed. 705 (709), affirmed in Palmer v. Texas, the case last cited.

The opinion of Judge Parker in a rather recent case, Wanamaker v. Eaves, 79 Fed. (2) 533 is a clear exposition of the subject, the force of which can only be appreciated by reading it as a whole.

Although perhaps immaterial for present purposes, this doctrine prevails in Pennsylvania, as appears in Doyle's Estate, 291 Pa. 263, and Nevin *et al.* v. Catanach, 264 Pa. 523.

This paves the way for a consideration of

2.

The Application Of This Principle.

(a)

The Import Of The Cited Cases.

At the risk of repetition, it may not be amiss to direct attention to the precise nature of this proceeding.

The cause was instituted by a Bill, the primary object of which was to charge specific property with a lien to secure the payment of certain sums out of the

profits of a mining property against which the lien was sought.

The lien was established by the original decree in this cause. No payment was to be made directly to any beneficiary. The lien could be realized upon and enforced only by trustees and only through the medium of the trustees could the beneficiaries receive payment.

This lien was a thing, an entity, or *res*. It was itself a trust fund held by the trustees for the use of the beneficiaries, but to be administered and enforced only by the trustees.

In 1915 the character of this lien was radically changed. It was transmuted into a mortgage to secure the payment of $700,000.00 less a certain sum already accumulated.

Thus a genuine trust fund was created consisting of the mortgage and the then accumulations. The accumulations were to be invested and re-invested by the trustees, and as the mortgage was from time to time paid, the proceeds were to be likewise invested and re-invested. The trust is to continue during the lifetime of Lida, one of the original plaintiffs. At her death it terminates. The principal of the alimony fund, $400,000.00, then becomes payable to Fitzgerald, who supplied the money, or his heirs or assigns. The $300,000.00 then becomes distributable to the children, John, Gerald and Edward.

All the promises to pay out of profits of the business as contemplated by the original contract have been eliminated, and for them has been substituted a specific fund to be kept invested by the trustees

during the continuance of the trust. It requires active administration. Out of the income realized from the investment of the principal, certain annual payments are to be made.

This is a trust-estate, pure and simple.

At the death of plaintiff Lida, the trust terminates and there must needs be a final settlement. The principal fund will then be transferred in kind to the beneficiaries or converted into money and the proceeds distributed, or it may be that part of it may be set over in kind and the remainder sold.

The trust fund having been created by the decree of the state court, it has sole and exclusive jurisdiction over it and of its administration until final settlement.

This is the doctrine of the cases cited, and it here applies in its full vigor because this trust fund is itself a *res*, entity or thing of which that court has potential control and constructive possession.

Matters of administration are questions arising in the course of this cause, and it was said in the Peck case, (48 U. S. 612) "that when a court has jurisdiction it has a right to decide every question which occurs in the cause".

In the Farmers' Loan case (177 U. S. 51) it is laid down that the rule is not restricted to cases where property has been actually seized, "but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates".

Here the suit was brought to establish a lien, and in its present status is the administration of a trust.

In that case it is further said that the rule applies to cases where "the court may be compelled to assume the possession and control of the property to be affected".

Here the court may be compelled, in order finally to settle this trust, to direct the sale of the trust property in whole or in part.

Actual physical possession is not necessary. In the Harkin case (276 U. S. 36) it is predicated that "the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so".

The state court has control of the property in question, for as is said in the Adelbert College case (208 U. S. 38), the court which first acquires control of property has "jurisdiction to hear and determine all questions respecting the control of the property", which precludes the jurisdiction of any court of coordinate authority.

In the Burke case (260 U. S. 226) it is declared that the effect of the doctrine is to "draw to the Federal court (*mutatus mutandi* to the state court) possession or control, actual or potential, of the *res* and the exercise by the state court of jurisdiction over the same *res* necessarily impairs and may defeat the jurisdiction of the federal court".

The action here is clearly *in rem*, and possession and control of the trust property is potentially in the state court. Because there is a *res*, this action is certainly not personal, and whether it be strictly *in rem*

or only *quasi in rem* makes no difference, for as said by Justice Stone in the Penn Casualty case (294 U. S. 189) "if the two suits are *in rem* or *quasi in rem* * * * the jurisdiction in one court must of necessity yield to that of the other".

A court, whether state or federal, which first acquires potential control of property, whether by the mere filing of a bill to subject that property to the management or ultimate disposition of such court, or by the entry of decrees impressing it with certain trusts which may ultimately require its disposition by such court, acquires jurisdiction that is sole and exclusive so far as that property is concerned.

This is equally true whether the court first acquiring jurisdiction is state or federal.

It is clearly so declared in the Palmer case (212 U. S. 118), in which Justice Day said:

> "If the state court had acquired jurisdiction over the property by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well settled principles, often recognized and enforced in this court, there should be no interference with the action of the state court while thus exercising its authorized jurisdiction."

This doctrine does not mean that federal courts are superior to state courts, or vice versa. As was said by Justice Moody in the Adelbert College case (208 U. S. 38):

> "Those principles (the exclusive jurisdiction of the court first acquiring control), * * * are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property which would be unseemly and subversive of justice."

The state court first acquired jurisdiction of the subject matter, that is, certain property and its administration by the trustees. Thereby it acquired jurisdiction of all questions arising out of the management and administration of the property. If what has been done in the state court has been enacted in the federal court, it is beyond question that for the Court of Common Pleas to entertain a bill similar to that filed by Lida and John in the District Court would be unseemly and subversive of justice.

That the first action was in the state court does not differentiate that consequence. Palmer v. Texas, *supra*. The state court having acquired jurisdiction, the District Court has no superior right and for it to entertain the bill filed by Lida and John is just as unseemly and subversive of justice as if the original proceeding had been in the federal tribunal and the Bill, the prosecution of which is here sought to be restrained, had been filed in the state court.

The state court has at least constructive possession of this trust fund and the trustees *in propria vigore* are officers of this court.

> "An administrator appointed by a state court is an officer of that court, his possession of the decedent's property is a possession taken in obedience to the orders of that court, it is the possession of the court."
>
> Yonley v. Lavender, 21 Wallace 276.

Apparently the latest expression by this court upon the principle here involved is that in the case of

> United States v. Bank of New York & Trust Co., 296 U. S. 463,

where the court said (p. 477):

"In both these cases the proceedings in the State Court were *quasi in rem*. Control of the funds was essential to the exercise of the Court's jurisdiction to protect the rights of claimants * * *. The principle, applicable to both Federal and State Courts, that the Court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, *administer trusts* (italics supplied), or liquidate estates, and in suits of a similar nature, where to give effect to its jurisdiction, the Court must control the property * * *. If the two suits are *in rem* or *quasi in rem*, so that the Court must have possession or control of the *res* in order to proceed with the cause and to grant the relief sought, the jurisdiction of one Court must of necessity yield to that of the other * * *. This principle is applied in the discharge of the long recognized duty of this Court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States.'"

In

Byers v. McAuley, 149 U. S. 608,

where a decedent's estate was being administered in an Orphans' Court, this court reversed the decree of a federal circuit court which directed the administrator of the estate to file an account and formulated a schedule of distribution, and said (pp. 612, 629):

"It is obvious from the decree which was entered that the Circuit Court of the United States assumed full control of the administration of the estate * * *. The decree as a whole cannot be sustained, unless upon the theory that the Fed-

eral Court had the power on the filing of this bill to take bodily the administration of the estate out of the hands of the state court, and transfer it to its own forum * * *. Our conclusion * * * is that the Federal Court erred in taking any action or making any decree looking to the mere administration of the estate * * *."

"The doctrine is well settled that when a court, in the progress of a suit properly pending before it, takes possession of property, either under a writ of replevin or attachment, or by other *mesne* or final process, or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired * * *. The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons * * *. The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts* (italics supplied), or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end without interference or hindrance on the part of any other court." Merritt v. American Steel-Barge Co., 79 Fed. 228, 231.

The right of a court to issue an injunction directed to a suitor and not to any court upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, was expressly sustained by this court in

Steelman v. All Continent Corporation, 301 U. S. 278,

in which Mr. Justice Cardozo says (292):

> "We are unable to yield assent to the statement of the court below that 'the restraint of a proper party is legally tantamount to the restraint of the court itself.' The reality of the distinction has illustration in a host of cases."

(b).

A Distinction Of Importance.

In the light of the record here, and by force of the principles declared in the cases cited, it cannot be disputed that the state court has constructive possession and potential control of the fund in question, and that in virtue of these facts, its jurisdiction is sole and exclusive.

However, this does not necessarily preclude a federal court from exercising a limited authority for specific purposes where it would otherwise have jurisdiction. This jurisdiction, however, does not comprehend any interference with the fund or its control and management, but is strictly confined to the ascertainment of the rights of complaining persons to share in its distribution, either as creditors or beneficiaries.

It springs out of the consideration that the jurisdiction of a federal court in equity is derived from the Constitution which vests such courts with the authority of that of the High Court of Chancery in England, but

this in no way conflicts with the rule of sole and exclusive jurisdiction where possession or control, whether actual or potential, of property has been acquired by a state court. In such cases a federal court may give relief consonant with the principles of equity, but may not control, supervise or annul the proceedings of the state courts.

The case is completely analogous to a testamentary trust created by a will probated in an appropriate court. In such case, the federal court may, where it otherwise has jurisdiction, determine the interest of a party in the fund, and while the state court must respect that finding, it still retains exclusive jurisdiction to administer and distribute the fund.

There are many cases dealing with this branch of federal jurisdiction and it is not possible to discuss all of them. They uniformly recognize and emphasize this distinction and reference to two illustrative ones will suffice for present purposes.

A leading case is

Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33.

In that case plaintiff filed a bill, which, had all her prayers been granted, would have taken a fund out of the control of the probate court, but she also prayed to have her interest in the fund established. The lower court dismissed the bill for want of jurisdiction, but this court held that while much that was prayed for could not be granted, the federal court had jurisdiction to decide what her interest in the fund was, and therefore re-instated the bill to determine that particular question.

Mr. Justice Day, delivering the opinion, said (43):

"From an early period in the history of this court cases have arisen requiring a consideration and determination of the jurisdiction of the courts of the United States to entertain suits against administrators and executors for the purpose of establishing claims against estates, and to have a determination of the rights of persons claiming an interest therein. And this court has had occasion to consider how far the jurisdiction in equity of the courts of the United States in such matters may be affected by the statutes of the States providing for courts of probate for the establishment of wills and the settlement of estates. We will not stop to analyze or review in detail all these cases, as they have been the subject of frequent and recent consideration in this court. The general rule to be deduced from them is that, inasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different states arise which are within the established equity jurisdiction of the Federal Courts, which is like unto the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789, the jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters. This court has uniformly maintained the right of Federal Courts of Chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees and heirs to establish their claims and have a proper execution of the trust as to them."

The phrase to "have a proper execution of the trust as to them" means that the state court shall give full effect to the federal decree in so far as it defines the rights of the parties, and that the trust shall be executed by the state court on the basis of the decree of

the federal court. It has no reference to the management or administration of the fund.

Justice Day continues (43-44):

"The rule stated in many cases in this court affirms the jurisdiction of the Federal Courts to give relief of the nature stated, notwithstanding the statutes of the State undertake to give to state probate courts exclusive jurisdiction over all matters concerning the settlement of accounts of executors and administrators in the distribution of estates. This rule is subject to certain qualifications, which we may now notice. The courts of the United States, while they may exercise the jurisdiction, and may make decrees binding upon the parties, cannot seize and control the property which is in the possession of the state court."

Again he says (45):

"In view of the cases cited, and the rules thus established, it is evident that the bill in this case goes too far in asking to have an accounting of the estate, such as can only be had in the probate court having jurisdiction of the matter; for it is the result of the cases that in so far as the probate administration of the estate is concerned in the payment of debts, and the settlement of the accounts by the executor or administrator, the jurisdiction of the probate court may not be interfered with. It is also true, as was held in the court below in the case at bar, that the prior possession of the state probate court cannot be interfered with by the decree of the Federal Court. Still, we think there is an aspect of this case within the Federal jurisdiction, and for which relief may be granted to the complainant, if she makes out the allegations of her bill under the other prayers, and the prayer for general relief therein contained. Under such prayer a court of equity will shape its decree according to the equity of the case."

The learned justice continues (46):

> "The United States Circuit Court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to determine as between the parties before the Court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill."

By way of conclusion it is said (50):

> "Upon the whole case we are of opinion that the Federal Court has jurisdiction for the purpose of ascertaining the rights of the complainant to recover as against the executor, and the interest of the persons before the court in the fund. While the court could make no decree which would interfere with the possession of the probate court, it had jurisdiction to entertain the bill and to render a judgment binding upon the parties to the extent and in the manner which we have already stated."

A casual inspection of the bill and amendment filed in the Federal Court shows that no controversy concerning a share or interest in the fund is raised. That was all settled by the former proceedings in the state court. The matter involved is the conduct of the trustees in the administration of the fund and is excluded from Federal jurisdiction by the very words of Justice Day:

> "The Bill in this case goes too far in asking to have an accounting of the estate such as can only be had in the probate court having jurisdiction of the matter; for it is the result of the cases that in so far as the probate administration of the estate is concerned in the payment of debts and the settlement of the accounts by the executor or

administrator the jurisdiction of the probate court may not be interfered with."

Here the only questions raised in the federal court are exclusively matters of accounting, of which the state court has exclusive jurisdiction.

Another strikingly illustrative case is

Commonwealth Trust Co. v. Atwood, 78 Fed. (2) 92.

Bank of Pittsburgh National Association established a mortgage pool, of which the Orphans' Court of Allegheny County, after the insolvency of the Bank, appointed Commonwealth Trust Company successor-trustee. The Bank of Pittsburgh had advanced certain moneys to the pool for the payment of interest and held a number of the participating certificates. The Orphans' Court in making distribution did not award anything to the receiver of the Bank either on account of the money advanced or certificates held by it.

The receiver then filed his Bill in the United States District Court and that court found that the Bank had advanced $40,213.58 which it allowed as a claim to be paid in full out of the pool and directed the trustee to pay. It further found that the Bank had a participating interest of $291,020.45 and directed the trustee to pay on account thereof a dividend corresponding with that already paid on like claims.

The question of the jurisdiction was raised on appeal and Judge Woolley said (94):

"It is certain that, so far as the *res* of the estate now being administered by the Orphans' Court are concerned, the jurisdiction of that court

is exclusive. A federal court cannot reach into the state court and take the *res* or enforce a right to specific property in possession of its receiver or trustee, except upon application to the court which appointed him. Riehle v. Margolies, 279 U. S. 218, 49 S. Ct. 310, 73 L. Ed. 669; Harrison v. Moncravie (C. C. A.), 264 F. 776, 779. It is likewise certain that a federal district court, on jurisdiction otherwise shown, as diversity of citizenship or, as in this case, liquidation of a national bank, may establish 'a claim constituting the basis of a right to participate in the distribution of property in the possession of' another court. The judgment of the federal court does not in such case purport to deal with property. Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536. It deals solely with the existence and amount of a claim, Riehle v. Margolies, *supra;* Harrison v. Moncravie, *supra,* which when established by decree takes its 'share of the estate as administered by the probate court.'"

However, the directions of the trustee to pay made by the court below were set aside and the opinion states (95):

"We approve the conclusions of law made by the learned trial court on the stipulated facts establishing the several claims of the bank to proceeds of the mortgage pool in liquidation, but are constrained to differ in respect to its orders addressed directly to the trustee appointed by the Orphans' Court to pay certain of them forthwith. As these orders, in practical effect, reach into the estate and grasp the *res,* against which there may, for ought we know, be claims of higher rank or with priorities, and concerning which certainly the Orphans' Court, first to acquire jurisdiction, is alone authorized under the cited authorities to make distribution and pay the claims here finally adjudged, it becomes necessary that the learned District Court modify the first and third paragraphs of its decree; the first paragraph by with-

drawing its mandate to the trustee, an officer of the Orphans' Court, to pay the bank's claim there established, and the third paragraph by withdrawing a like mandate to the trustee to pay the bank's claims there established, and by giving the claims established in paragraphs 1 and 3 priority of payments over any future distribution of assets to participants in the pool."

On appeal to this court, Commonwealth Trust Co. vs. Bradford, 297 U. S. 613, 80 L. Ed. 920, the distinction here made is well stated by Mr. Justice MacReynolds (924):

> "The original bill revealed that the Receiver had been denied participation as a *cestui que* trust in the assets held by petitioner Trust Company, and asked an adjudication of his rights therein. He did not seek direct interference with possession or control of the assets; he prayed that his right to partake thereof be determined."

Quite obviously the Bill and Amended Bill of Lida and John does not ask for any relief within the jurisdiction of the federal court, and is addressed exclusively to what is in effect an accounting, of which the state court has sole and exclusive jurisdiction.

Brief mention should perhaps be made of

Payne v. Hook, 74 U. S. 425.

Taken literally, the opinion seems to indicate that given the requisite diversity of citizenship or other ground of federal jurisdiction, there is no case that may not be brought within the realm of federal jurisdiction.

It has been so explained, modified, and applied that it is not now deemed to conflict with the doctrine declared in Waterman v. Canal-La. Bank, *supra*, already quoted, in which the prevailing principle is announced.

After a final decree was entered in that case, there was another appeal,

Hook v. Payne, 81 U. S. 252,

and much of the former opinion, if not in terms reversed, was largely departed from.

In

Levi v. Columbia Life Insurance, 1 Fed. 206,

it was said (211):

"Whether Payne v. Hook is authority for anything is a question",

and some poignant, but none the less apt, criticism is made.

The opinion in

Yonley v. Lavender, 88 U. S. 276,

enunciated what is the now accepted principle antithetic to what was first said in Payne v. Hook. There is an earnest endeavor at reconciliation that does not very well succeed.

Directly opposite to what was said in the Payne-Hook case is what was decided in Byers v. McAuley, 149 U. S. 608. Here again there is an ineffectual effort to distinguish and reconcile.

The ruling, however, is in perfect harmony with the principles declared by Mr. Justice Day in the Waterman case.

Another case cited by Justice Day exemplifying the modern conception is

Farrell v. O'Brien, 199 U. S. 89.

The opinion of Justice White in that case, to which there will be later allusion, is conclusive that federal jurisdiction in the class of cases to which that at bar

belongs, is strictly limited and not of the broad and expansive character the opinion in Payne v. Hook might seem to indicate.

It should be observed that in Payne v. Hook there was an allegation of fraud, which is a favorite subject of a court in equity, and the real ground of decision is that the equity jurisdiction of the federal court attached because there was a fraud. This is the basis of the distinctions made in later comments concerning it, to which there has been reference.

Nothing said or decided in Payne v. Hook affords a semblance of reason for denying to appellees the relief here sought.

3.

Some Particular Features.

Under the authority of the cases cited, there should be no difficulty in reaching the conclusion that the state court has sole and exclusive jurisdiction of the instant trust fund and of the trustees who are administering it, and that this inhibits any other court of concurrent jurisdiction from entertaining any suit having to do with that trust fund as a *res* or thing. This amply warrants the relief sought by the trustees.

However, there are certain peculiar facts rendering the enforcement of the doctrine imperative. The present purpose is to point them out as succinctly as possible.

(a)

Lida and John Are Parties.

Lida and John, plaintiffs in the Bill filed in the federal court, are parties plaintiff in this action in

the state court. They were suitors for the purpose of procuring a lien on specific property out of which the present fund has arisen.

They were parties in this action when the lien was converted into a fixed sum to be realized and administered as directed by the decree of 1915.

From that time they have regularly received and accepted the income to which, in virtue of that decree, they are respectively entitled; they have claimed and enjoyed the benefits of that decree. Having come into that court, and it, at their instance, having created the fund, and having begun the administration thereof, it is not within their power or right to withdraw from the jurisdiction of the court that subject matter and to review the administration of that fund in any other tribunal.

This results inevitably from the principle already demonstrated.

In final analysis, what they are attempting is to call upon the trustees to account, at least in part, in a court other than the one whose jurisdiction they first invoked.

There is no doubt of the right and duty of a court to discipline a contumacious party. Lida and John are interfering with the trust fund in the potential custody of the state court by attempting to litigate questions arising out of the administration thereof in another tribunal. This conduct is a defiance of the authority of the state court and an insult to its dignity.

There is ample authority to hold this conduct a contempt, and the duty of the state court to restrain it is obvious.

Plaintiffs in the federal court seek to have the trustees adjudged negligent, to surcharge them for losses alleged to have occurred on certain investments, and to remove them or require them to give bond.

If the suit in the federal court be maintained and it adjudge and determine of and concerning these things which are incidents and part and parcel of the administration of the trust fund in the custody of the state court, to that extent the administration of the trust fund is taken out of the control of the state court.

The determination of the federal court will render nugatory anything that the state court may decree in connection with such of the acts of the trustees as are brought within federal cognizance, and this may be all, as well as only part.

The opinion of Chief Justice Tanney, sitting at circuit, in

Wartman v. Wartman, 29 Fed. 303,

is an illuminating authority. He there said:

"Disobedience to and defiance of the legitimate authority of the court is contempt."

Whenever an act is done in respect of the subject matter of litigation which may render nugatory the decree of a court, there is a contempt, and that even in the absence of any intent, Wartman v. Wartman, *supra*.

The following from the opinion of Justice Kephart in

State Grand Lodge of Pa. v. Morrison, 277 Pa. 41,

here applies with crushing force (47):

"To set at naught decrees of a court without injury resulting therefrom might, in exceptional

> cases, be condoned, but to set at defiance those decrees where property and individual rights are solemnly finally adjudicated, and to raise impediments to frustrate the execution of these decrees, is without a semblance of justification. If any court permits such contempts to go unpunished, it might as well close its doors, proclaim itself incapable of functioning, and become itself contemptible. We have not at all reached this stage; the court below is not without power to vindicate its own decrees and to punish for disobedience."

There can be no question that the effect of the action in the federal court is "to raise impediments to frustrate" the exercise by the state court of the jurisdiction which it has acquired of the subject matter here involved.

As was said in the opinion, that court "is not without power to vindicate its own" jurisdiction.

(b)

Lida And John Have No Right Of Action In The Federal Court.

An inspection of the Bill and Amendment filed in the District Court discloses that the complaint is the misconduct of the trustees as trustees.

It alleges that they have been grossly negligent; that they have made certain investments on which there will be losses; and that they are continuing to make improper investments.

It is too elementary to admit of discussion that these charges are against the trustees in the discharge of their official duties, and that the Bill brings under review their management of the trust fund.

As trustees they are charged with the duty of accounting for their management and stewardship and a proceeding of that character is the only one by which their personal liability may be determined.

Their management of the affairs of this trust is preeminently within the sole and exclusive jurisdiction of the state court, and an examination of the record shows that they filed an account in 1925, which has been confirmed. It includes a great many of the investments brought in question by the Bill.

The record further shows that they filed an account in 1930, to which certain exceptions are pending. It includes a number of the investments challenged by the Bill, and these two accounts in combination include all the criticised investments except one.

A petition was presented to remove the second of these accounts to the District Court, which was denied. In the opinion it was said:

> "The account shows payment into each of these funds, and these funds in effect being created by the court, they still are in the custody of the court."

The state court then actually has for adjudication two accounts including all the items specifically mentioned in the Bill, with a single exception.

The suit in the federal court is not in behalf of all the beneficiaries—the remainderman of the Alimony Fund is not made a part , and one of the beneficiaries of the Children's Fund is not a party. The plaintiffs in that Bill are the life tenant of the Alimony Fund and a life tenant of the Children's Fund, having a one-sixth interest, and as a remainderman in that fund, a one-third interest.

The remainder of the Alimony Fund is held by the Second National Bank of Uniontown in trust for certain purposes, and to join it would oust the jurisdiction of the court. Gerald, Jr. has a one-sixth interest as life tenant in the Children's fund and a one-third interest in the remainder of that fund. He is a citizen of Pennsylvania, and to join him would oust the jurisdiction.

It is very obvious that the accounts of the trustees cannot be settled in that proceeding for want of indispensable parties, and to join those parties would oust the jurisdiction of the court.

The suit in the federal court is not in behalf of the trust fund as against the trustees, but is personally by Lida and John apparently in their own right.

Most certainly they cannot recover a judgment against the trustees for the benefit of themselves and require the trustees to make payment to them for anything done in the administration of the estate.

If the trustees have so managed the fund as to render themselves personally liable for a resulting loss, that loss as such does not belong to Lida and John, even in fractional interest and shares, but to the corpus of the trust estate itself. The liability of the trustees to make good losses demands and requires restoration of the losses, either to themselves as continuing trustees, or to successor-trustees.

Lida and John have no right to receive anything out of the trust fund except on distributions made by the trustees; they can obtain nothing except through the medium of the trustees.

If, for illustration, the trustees had defaulted in a given sum, that default is property of the trust, and making good the default simply restores to the fund what has been taken from it. Exactly the same result follows where there has been a loss through negligence or illegal investment. It must be restored to make good the fund.

Plaintiffs in the federal court can obtain no relief that cannot be procured by an accounting in the state court. In fact, the orderly method to ascertain the liability of the trustees, if any, is by an accounting.

What the Bill in the District Court actually seeks is a partial accounting. Were a complete accounting sought, it could not be maintained. Where one court has jurisdiction of a trust fund, another court of concurrent jurisdiction cannot entertain a proceeding to account. Thus, where a trust fund is involved in any equity proceeding in the Common Pleas of Pennsylvania, the Orphans' Court cannot accept and audit an account. If it could "the varient decrees of the different courts would lead to confusion and injustice.", Breyer's Estate, 19 D. & C. 255.

However, as is decided in the Waterman v. Canal-La. Bank case (215 U. S. 33), which has been already considered in detail, an accounting cannot be had in the federal court.

In order that such court may have jurisdiction the suit must be an independent one *inter partes*, and not ancillary or auxiliary. This is predicated by Justice White in

Farrell v. O'Brien, 199 U. S. 89.

That proceeding was in a federal court, and the object was to set aside the probate of a will. If a state has a statutory system by which an appeal from the probate of a will may be taken or the right is given by custom, then the appeal is only ancillary, a mere continuance of the probate proceeding, and the jurisdiction of the state court is exclusive, so that a federal court may not take cognizance of a suit for that purpose. (This is the converse of Payne v. Hook, *supra.*)

On the other hand, if the state does not by statute or custom have such a system, but the will may be attacked in equity in an independent suit, a federal court, if the required jurisdictional facts exist, may entertain such an action.

In the case cited Justice White (later Chief Justice) said (110):

> "The cited authorities establish that the words referred to must relate only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding, that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect. We say the words action or suit *inter partes* must have this significance, because unless that be their import it would follow that a State may not allow any question to be raised concerning the right to probate at the time of the application, or any such question thereafter to be made in an ancillary probate proceeding without depriving itself of its concededly exclusive authority over the probate of wills."

This idea is even more fully developed in the same case in the Circuit Court of Appeals.

Carrau v. O'Calligan, 125 Fed. 657,

the first syllabus of which is (657):

> "Federal Courts—Equity Jurisdiction—Setting Aside Probate of Will. A federal court of equity is without jurisdiction of a suit to set aside the probate of a will, unless by the law of the state a suit in equity for the purpose may be maintained in a state court, in which case a similar suit may be maintained in a federal court. Where the requisite diversity of citizenship and other jurisdictional facts exist."

Applying this principle to the suit in the District Court, it is evident that the action is not an independent suit *inter partes*, but is only ancillary or auxiliary.

An independent suit *inter partes* is one in which the actors may obtain directly personal relief of some sort. It might be the establishment of a claim, as in Commonwealth Trust Co., *supra*. Conceivably, there might be cases where money would be ordered to be paid or other direct relief awarded.

Nothing sought in the suit here involved is referable to these categories. The things sought are solely incidental to the administration of the trust fund—they are therefore only ancillary.

The time for distribution has not arrived. The fund is, as it were, a going concern and the matters sought to be litigated involve only administration and management. These do not relate to substantial rights, and although important, are only incidental, auxiliary and ancillary. A suit addressed to them is not an independent one *inter partes* as those terms are used in federal jurisprudence.

If the trust here involved had been created by a will, the exclusive jurisdiction of the Orphans' Court of the county in which it was probated would be beyond doubt. The jurisdiction of the state court rests on just as firm a foundation.

The fund arose out of a contract. John and Lida, with the other beneficiaries, invoked the jurisdiction of the Court of Common Pleas of Fayette County to enforce that contract and execute the trusts it created.

Responsive to their prayer, the state court entered its decree enforcing the contract and for more than twenty-five years has been engaged in supervising the administration of the trust.

Having invoked the jurisdiction of that court, John and Lida cannot rush into some other court to litigate the disputes arising out of and incidental to the execution of this trust.

A party may not be in court and out of court at will.

(c)

The Proceeding In the Federal Court is not Candid.

Neither the Bill nor the Amendment makes even indirect reference to the proceedings in this cause. The original contract is set up, but that a lien to secure the payments to be made was established in virtue of the decree of the state court is not mentioned.

Neither is it disclosed that Fitzgerald has made payment in full of all sums required by the original contract by him to be made and that a principal fund to yield an income, out of which the payments to Lida are to be made has been created, and that this was all done in virtue of the decrees of that court. In like

manner, it is not made to appear that an active trust to continue during the lifetime of Lida, requiring management and administration, has been established, and that this trust fund has been in the control and jurisdiction of the state court since 1915.

There is no reference to the fact, as disclosed by the record here, that the trustees have filed three accounts, one of which has been confirmed and the other two of which remain pending subject to exceptions, which three accounts include every investment challenged by the original bill, and all the investments challenged by the amendment, save one.

If these facts had been fairly and candidly stated a motion to dismiss the bill for want of jurisdiction would lie. In that situation the bill would disclose that the state court had sole and exclusive jurisdiction, which precludes interference by the federal court with that subject matter. However, as the Bill was drawn, that infirmity did not appear on its face, and a motion to dismiss would not lie.

As the record stands, the proceedings in the state court can be brought in only by answer and proof, and unless the prosecution of that suit be restrained, as here sought, there will needs be a plenary trial in the federal court before the question of jurisdiction can be raised and determined.

Whether intended or not, the result is that plaintiff has not fairly disclosed the facts on which the precedent jurisdiction had attached, and which preclude the federal court from taking jurisdiction.

In the Brundage case, (72 Law Ed. 457) Chief Justice Taft said (465):

"In this country, in which in every state we have courts of concurrent jurisdiction under the Federal and the state authority, it is of the highest importance that conflict of jurisdiction should be avoided. It can only be avoided by forbearance and comity, and by enforcing upon the parties and counsel engaged the utmost good faith and the fullest disclosure in one jurisdiction with reference to what are the exact facts relevant to litigation in a corresponding case in the other."

Continuing, the Chief Justice said (466):

"What was done here in delaying the state court and inducing the Federal court to act without a full disclosure of what had been done in the state court, was a fraud not only upon the state court but upon the Federal court itself, and when the Federal court learned the method by which its jurisdiction to appoint a receiver had been invoked, it should have denied to those who were guilty the further use of its jurisdiction until after the state court had been given an opportunity to exercise the jurisdiction which it was entitled to exercise, even to taking possession of the property."

In that case a stockholder of a corporation filed a creditor's bill in a state court for the appointment of a receiver. On the date fixed for a hearing on the motion to appoint, an attorney representing the defendant appeared and requested a postponement for a few days, which was granted. During the *hiatus* the defendant procured a creditor to file a bill in the federal court, to which it filed an answer, admitting the allegations of the bill. A motion for the appointment of a receiver was then made, and the defendant consenting, was allowed. No notice of this proceeding was given the plaintiff in the bill in the state court.

This court held that the use of the period of delay, procured as stated, for this purpose, and the failure

to advise the federal court of the pendency of the case in the state court, especially of the latter, were a fraud on both the state and federal court.

It was sought to sustain the Federal proceeding on the grounds that the two actions were different, the one in the state court being a stockholder's bill, while that in the federal court was a creditor's bill.

Conceding that there might be some merit to this contention, it was held that the proceeding in the state court could have been readily converted into a creditor's bill by a simple amendment, and the Chief Justice said (466):

> "But the two proceedings, while not the same, were closely related, and the proceeding in the state court must by the subsequent insolvency have resulted in reframing in the state court the pleadings so as to make it a creditor's bill. Hence they were closely enough related to call upon the Federal court to refuse thereafter to continue jurisdiction through its receiver, and to surrender custody of the *res* to the receivers of the state court. Such action we deem to have been that which the comity and the good faith of a Federal Court owed to the state court."

The attitude of a federal court in a situation of the character under consideration is thus stated (466):

> "Nor should there be any competition or rivalry on the part of the two courts themselves in regard to assuming jurisdiction."

The foregoing excerpts only meagerly indicate the full significance of this case, and its far reaching effect can only be assessed by reading the opinion as a whole.

The duty of a litigant invoking the jurisdiction of a tribunal of concurrent authority to disclose fully and accurately just what has been done in some other

tribunal, is mandatory and fundamental. That Lida and John did not do, and that is abundant reason to restrain them from prosecuting their misleading and deceptive action in the federal court.

Punitive measures against attorneys and individuals in such cases are not sufficient to atone for the transgression of procuring the jurisdiction of a federal court where the result is to deprive a state court of its rights, said Chief Justice Taft in the case cited.

That is equally true here. Nothing, he pointed out, short of a restoration to the state court of its rights met the requirement of simple justice to which it was entitled.

That is the precise situation here. Punitive measures against Lida and John, no matter how severe, do not meet the ends of justice. The rights of the state court must be vindicated and the most effective method to accomplish that salutary result is a decree restraining them from persisting in their contemptuous conduct.

4.

The Duty Of This Court To Enjoin.

The right of the state court to restrain the prosecution of the Bill in the federal court cannot be seriously questioned, and that under circumstances such as here exist it is the duty of the court to exercise its power is manifested by a number of authorities.

The right is distinctly recognized in the Penn Casualty case (294 U. S. 189). In that case a Bill for the appointment of a receiver was first filed in the federal court for the Eastern District of Pennsylvania. While it was pending a Bill was filed by the Secretary of Banking in the Court of Common Pleas of Dauphin

County, Pennsylvania, a receiver appointed, and the defendant commanded to turn its assets over to that receiver and enjoining it from delivering possession to any other, rival receiver.

Thereafter the federal court appointed a receiver and entered a like order and injunction.

On appeal the Supreme Court of Pennsylvania affirmed the decision of the Common Pleas. This court in the case cited reversed, holding that the federal court by the filing of the Bill first acquired jurisdiction, and such jurisdiction being sole and exclusive, the Pennsylvania court was without jurisdiction.

The power of the state court to restrain, had its jurisdiction not been ousted by the prior jurisdiction of the federal court, is thus distinctly recognized.

The duty of the court in the premises is distinctly predicated in

Continental Ill. N. B. & T. Co. v. Chicago, R. I. & P. R., 294 U. S. 648, 79 L. Ed. 1110.

It is there said by Mr. Justice Sutherland (675):

"The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is therefore inherent in a court of bankruptcy as it is in a duly established court of equity."

The opinion continues (675):

"We held (in Kline v. Construction Co., *supra*) that a Federal Court, having first acquired jurisdiction of the subject matter, could enjoin the parties from proceeding in a state court of concurrent jurisdiction 'where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court.'"

In the Kline case it is stated that conversely the state court has like power if it were the first to acquire jurisdiction.

Continuing, Judge Sutherland says (676):

"An injunction may be issued in such circumstances for the purpose of protecting and preserving the jurisdiction of the court 'until the object of the suit is accomplished and complete justice done between the parties.'"

This court in

Looney v. Eastern Texas Railroad Co., 247 U. S. 214,

dealt with a case where certain suits were instituted challenging the validity of orders of the Interstate Commerce Commission.

The Attorney General of Texas, who was a party to the suit in the federal court, later filed a Bill raising the same questions there in litigation in a state court. An application to restrain the prosecution of that case was made to the federal court and an injunction issued.

On appeal, this court affirmed the issuing of the writ and said (221):

"The use of the writ of injunction by Federal Courts first acquiring jurisdiction over the parties or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice (citing cases) in a rate case. So important is it that unseemly conflict of authority between State and Federal Courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other that Section 265 of the Judicial Code, Revised Statutes, Section 720, Act of March 2, 1793, chap. 22, 1 Stat. at L. 334, Comp. Stat. 1916,

Section 1242, has repeatedly been held not applicable to such an injunction."

If the state court were the first to exercise jurisdiction, the right is complete.

It was so in this case. That court was the first to take jurisdiction. One account had been filed, and there was a decree; the second account was filed before any attempt was made to take jurisdiction in the federal court. The case was pending, with all the parties in interest appearing, long before any question had arisen. The Court of Common Pleas of Fayette County had acquired jurisdiction and it was complete.

5.

The State Court Action Has Not Terminated.

The trust fund having been created by the decree of the state court, that court has sole and exclusive jurisdiction over it and of its administration until final settlement.

As has been stated, at the death of the Princess Lida, the trust terminates and there must needs be a final settlement. The principal fund will then be transferred in kind to the beneficiaries or converted into money and the proceeds distributed, or, it may be that part of it may be set over in kind and the remainder sold.

On November 6, 1933 the state court made an order authorizing the trustees to deposit certain bonds, a part of the trust funds (101-103) under a corporate re-organization plan for conversion into new debentures.

It is indeed difficult to understand how a court which has in the first instance created a trust fund

and controlled its administration, can be ousted of such jurisdiction by a proceeding subsequently instituted in a court of concurrent jurisdiction.

In its opinion the district court sets forth, and Appellants here contend, that the accounts filed in the state court by the Trustees from time to time were purely a voluntary act on their part. This contention is erroneous.

The Trustees were either appointed by the state court or by their co-trustees and their appointments confirmed by the state court. Their accounts in each instance were filed in the court which appointed them or confirmed their appointment and created the fund which they were administering, and which also directed the manner in which they were to administer the fund (100).

The Trustees could not account in any other court. The federal court would be without jurisdiction to entertain an account filed by them because there would be lacking the requisite diversity of citizenship, some of the beneficiaries being citizens of Pennsylvania as are the Trustees. A trustee could not be discharged by any court other than the state court because his appointment was confirmed by that court and his certificate of appointment issued to him.

6.

The State Court Action Is In Rem Or Quasi In Rem.

The language of Mr. Justice Stern in

Thompson v. Fitzgerald, 329 Pa. 497

clearly demonstrates that the action is one *in rem* or *quasi in rem:*

"It is, of course, true that the trust *res* is not in the possession of the Fayette County Court as

would be propegty in a receivership, but it seems reasonably clear that the administration of a trust falls properly within the class of cases governed by the principle giving to the Court first assuming jurisdiction in proceedings *quasi in rem* the exclusive right to determine questions of administration and management, as distinguished from the adjudication of individual rights and interests in the *res*. Not only do the authorities previously quoted specifically include trust administration in their statement of the rule, but, what is of chief importance, the reason underlying the rule applies forcibly to trust estates. In the present case the appointment of all the successive trustees was either made or confirmed by the state court. One of their accounts has been confirmed by that Court, and two others have been filed and are there pending, exceptions having been taken to them. In exercising jurisdiction over a trust estate a Court may frequently be obliged to make orders concerning even the physical custody and safekeeping of specific items of the trust property, or authorizing or directing their sale and the making of reinvestments; one order of the Court below in the present case, under date of November 6, 1933, directed the trustees to deposit certain bonds under a corporate reorganization plan for conversion into new debentures. An accounting by fiduciaries is in itself a proceeding *quasi in rem*, in the sense that it not only adjudicates the legality of the investments constituting the trust, but also, if it results in a surcharge, orders payment and restoration of moneys to the trust fund, that is to the *res*. Such a surcharge is not a judgment to pay money to individuals as in an ordinary personal action. Thus if appellants were successful in the proceedings under their bill in equity no judgment would or could be rendered for payment to them of any money; there could be merely an order for restitution to the trustees themselves as continuing trustees or to their successor trustees; in other words, the recovery would be by the trust fund and not by appellants, who can gain therefrom only upon

distribution of the income and ultimately of the corpus of the trust, as prescribed in the agreement by which it was created.

The line of distinction between proceedings *in personam* and those *in rem* to determine whether or not the jurisdiction acquired by the Court in which they are first instituted is exclusive is not to be drawn with academic nicety. The question is rather one of practical regard for the orderly and efficient administration of justice. If, as here, a Court has made or confirmed the appointment of Trustees, has audited, and continues to be engaged in auditing, their accounts, and, in general, has controlled the management and administration of trust funds for a considerable period of time, and another Court were to attempt to remove such trustees, appoint others, pass upon the propriety of investments already investigated and adjudicated or in process of investigation and adjudication by the first Court, and make orders on the trustees as to the furnishing of surety bonds and similar matters, the management and administration of the trust would be thrown into chaotic condition. As has already been pointed out, practically all the investments specifically attacked in the bill filed by appellants in the Federal Court were contained in the account audited and confirmed by the County Court in 1925 or in the 1930 account now pending audit, or in both. Unless such successive steps in the administration of a trust be regarded as a unit, the result would be, not only that partial accounts could be successively filed and adjudicated in different Courts, but the same account could be audited simultaneously by two Courts, with the obvious possibility of contradictory orders regarding the custody and sale of investments and the liability of the trustees."

7.

Conclusion.

The state court had jurisdiction. The Plaintiffs in the Bill filed in the District Court were two of the

Plaintiffs in the state court proceeding. They invoked the jurisdiction of the state court to settle that controversy. It was still pending when he Bill was filed in the District Court.

Having acquired jurisdiction by an action in which the Plaintiffs in the District Court were two of the Plaintiffs in the original action in the state court, the Court of Common Pleas of Fayette County, Pennsylvania had jurisdiction and it was beyond the power of the original Plaintiffs to change it.

WHEREFORE, Appellees submit that the state court had jurisdiction, that the present proceeding was merely to restrain a rival or conflicting jurisdiction, and that therefore the state court was right in entering the order from which the appeal is taken.

Appellees therefore submit that the state court was right in sustaining its jurisdiction, and that the judgment should be affirmed.

DEAN D. STURGIS,
W. BROWN HIGBEE,
Counsel for Appellees,
Uniontown, Pennsylvania.

SUPREME COURT OF THE UNITED STATES.

No. 118.—October Term, 1938.

Princess Lida of Thurn and Taxis, formerly Lida Eleanor Purcell Fitzgerald and John Purcell Fitzgerald, Petitioners,
vs.
Andrew A. Thompson, et al., Trustees.

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

[January 3, 1939.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents the question whether the exercise of jurisdiction by a state court over the administration of a trust deprives a federal court of jurisdiction of a later suit involving the same subject matter.

December 6, 1906, Gerald P. Fitzgerald, a citizen of Ireland, and his wife Lida, entered into an agreement with each other and with Josiah V. Thompson, Charles E. Lenhart, and Fitzgerald, as trustees, which recited the marriage of the two first named, that they had three sons, and that, on December 5, 1906, Lida had obtained a decree of divorce in Ireland. The agreement provided for payments of alimony by Gerald to Lida pending an absolute divorce (which was eventually granted), and for payments thereafter by Gerald to the trustees for the benefit of Lida and the children, to be made out of his share of the profits of two partnerships of which he was a member. From these profits Gerald was to pay the trustees for Lida's benefit an annuity of $15,000 for the first three years and $20,000 thereafter. He was further to pay any difference between the amount of the annuity and one-third of his share of the profits annually until a fund should be established in the hands of the trustees amounting to $300,000, in which Lida, the sons, and Gerald were given interests, either of income or principal or both. In the event of death, resignation, or disability of a trustee, or a successor trustee, the vacancy was to be filled by appointment of the two remaining trustees, or, on their failure to appoint, by the Court of Common Pleas of Fayette County, Pennsylvania, on the petition of a remaining trustee or of Lida.

Lida and the three sons are living. Gerald has assigned his interest in the trust to the Second National Bank of Uniontown, Pennsylvania.

Gerald performed the agreement until June, 1910, when he repudiated it. Thompson, one of the trustees, Lida and her sons, brought suit in equity in the Common Pleas Court of Fayette County, Pennsylvania, seeking performance of the agreement by Gerald and other relief. Gerald answered praying a declaration that the agreement was void. After a hearing the court entered a decree sustaining the agreement; ordering Gerald to account and to pay what might be shown to be due; removing him as a trustee; fixing a lien upon his partnership interests; and restraining him from encumbering or conveying them until the $300,000 fund contemplated by the agreement should be accumulated in the hands of the trustees.

In March, 1915, the trustees then in office petitioned for leave to amend the agreement and for modification of the earlier decree to provide that Gerald should pay and secure to the trustees the payment of sums sufficient to create two funds, one of $400,000 for Lida's benefit and the other of $300,000 principally for the sons' benefit. The court approved the petition and modified its former decree accordingly. May 25, 1925, the trustees then in office acknowledged receipt of all the sums due under the decree of the court as modified and directed that satisfaction of the decree be entered of record. This was done June 3, 1925.

October 9, 1925, the three acting trustees filed an account in the Common Pleas Court, which, in the absence of exceptions, was confirmed. July 7, 1930, a second and partial account was filed in the same court by two surviving trustees on behalf of themselves and a deceased trustee.

On the next day Lida and her son John brought suit in equity in the United States District Court for the Western District of Pennsylvania against the two trustees and the administrators of the deceased trustee, alleging mismanagement of the trust funds and praying that the trustees be removed and all the defendants be made to account and repay the losses of the estate. Thereafter the Court of Common Pleas extended the time for filing exceptions to the second account and, on February 16, 1931, exceptions were filed by Gerald P. Fitzgerald, Jr. Meantime the trustees moved to dismiss the bill in the federal court for lack of indispensable parties and because the state court had exclusive jurisdiction of the controversy. May 12, 1931, the federal court

refused the motion to dismiss and required the defendants to answer, declaring that it would not decide the question of jurisdiction until after answers had been filed. May 18, 1931, the defendants answered setting up that the controversy was within the exclusive jurisdiction of the state court. Nothing further was done in the federal suit until April 17, 1937, when the plaintiffs amended their bill. May 5, 1937, the trustees answered the amendment. Meantime, on May 1, 1937, the trustees had presented a petition in the state court for a rule upon the plaintiffs in the District Court, the petitioners herein, to show cause why they should not be restrained from prosecuting their suit in the federal court. After an answer by Lida denying that the Common Pleas Court had control or possession of the trust funds or that any controversy was therein pending when suit was instituted in the federal court, the rule was made absolute June 17, 1937. July 6, 1937, John Fitzgerald, one of the petitioners, applied to the federal court for an injunction to restrain the defendants in the case there pending, the respondents herein, from further prosecution of the proceedings in the state court. On the same day the petitioners took an appeal from the order of the Common Pleas Court to the Supreme Court of Pennsylvania. July 19, 1937, the trustees filed in the Common Pleas Court a third and partial account of the trust to which exceptions were filed. Testimony was thereafter taken on the exceptions to the second account. September 18, 1937, the federal court temporarily enjoined the defendants in that court, the respondents herein, from further prosecution of the proceedings in the state court to enjoin the plaintiffs, the petitioners herein, from having the jurisdictional issue tried in the District Court, and set November 8, 1937, for a trial of that issue. Trial was accordingly had.

March 21, 1938, the Supreme Court of Pennsylvania affirmed the order of the Common Pleas Court enjoining the petitioners from prosecuting their suit in the District Court,[1] and, on the same day, the District Court rendered an opinion holding it had jurisdiction notwithstanding the proceedings in the Common Pleas Court. The District Judge entered no decree but stated that requests for findings of fact, conclusions of law, and a form of decree, might be submitted, and that he would proceed thereafter to try the merits of the cause.

We are thus confronted with a situation where each of the courts claiming jurisdiction has restrained the parties before it from pro-

[1] Thompson v. Fitzgerald, 329 Pa. 497; 198 Atl. 58.

ceeding in the other. In view of this unusual state of affairs, of the importance of the question involved, and of the claim that the action of the Supreme Court of Pennsylvania is in conflict with our decisions, we granted the writ of certiorari.

First. The suit brought in Common Pleas Court in 1910 was for the specific performance of the agreement of December 6, 1906. The decree in that suit declared the agreement valid and commanded performance in accordance with its terms. As the agreement called for a continuing performance, and the decree was for enforcement of that performance, the court retained jurisdiction to render the granted relief effective. It exercised this retained jurisdiction in 1915 when, by consent of the parties, it modified its decree to comport with amendments of the agreement. But the court's jurisdiction under the bill ceased when Fitzgerald had completely performed in accordance with the amended decree of 1915, as evidenced by the trustees' acknowledgment filed of record in the court on June 3, 1925, that the terms of the decree had been satisfied. The trust was created by agreement inter partes, one of whom repudiated and failed to perform it. When performance had been obtained the equity proceeding was at an end; the trust res in the hands of the trustees, who were the creatures of the agreement, then had the same status as if the court had never been called upon to act.

Second. Although the agreement provided that vacancies occurring by death, resignation, or incapacity of a trustee should be filled by the remaining trustees, and that application to the Court of Common Pleas to appoint a new trustee should only be made in the event the trustees in office could not agree on the appointment of a successor, it appears that from time to time trustees presented their resignations to that court and the court purported to accept them. And when the remaining trustees appointed new trustees to fill vacancies they reported their action to the court which sometimes purported to confirm and ratify that action. The record does not disclose that the first method provided in the agreement for filling vacancies ever was impracticable, or that there was occasion for resort to the court. The petitioners contend that in the circumstances, the court's approval was unnecessary and did not amount to an assumption of jurisdiction. We find it unnecessary to pass upon the contention.

Third. The important questions are whether the filing of the trustees' account on July 7, 1930, gave the Common Pleas Court jurisdiction, and, if so, what was the nature and extent of that

jurisdiction. The Court of Common Pleas is given "the jurisdiction and powers of a court of chancery, so far as relates to: . . . The control, removal and discharge of trustees, and the appointment of trustees, and the settlement of their accounts."[2] Respecting the character of the jurisdiction conferred by a statutory grant so phrased the Supreme Court of Pennsylvania has said: "The scope of supervisory control of necessity includes any matter which concerns the integrity of the trust res—its administration, its preservation and its disposition and any other matter wherein its officers [trustees] are affected in the discharge of their duties."[3] This jurisdiction is vested in the court of common pleas of the county in which "any such trustee shall have resided at the commencement of the trust."[4] Two of the original trustees named in the agreement were residents of Fayette County. Two methods are provided for invoking the jurisdiction with respect to the administration of the trust. The court may cite the trustee on the application of any person in interest "to exhibit an account of the management of the trust estate."[5] The trustee may, on the other hand, obtain an adjudication of his management of the trust by filing his account in the office of the prothonotary of the court and, upon such filing, proceedings are to be had in the same manner as if he had filed the account under compulsion.[6] The trustee is permitted to have an adjudication of his stewardship in this manner every three years.[7]

It thus appears that whether an account be filed pursuant to citation or as the voluntary act of the trustee the jurisdiction of the court attaches and may be exercised over all the matters which fall within its supervisory control of the administration of the estate. The court has the power to fix the compensation of the

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[2] Act of June 16, 1836, P. L. 784, § 13; 17 P. S. § 281.

[3] Wilson v. Board of Directors of City Trusts, 324 Pa. 345, 551.

[4] Act of June 14, 1836, P. L. 628, § 15; 20 P. S. § 2741; § 16, 20 P. S. § 2872; § 23, 20 P. S. § 2767; Act of May 1, 1861, P. L. 680, § 1; 20 P. S. § 2871.

[5] Act of June 14, 1836, P. L. 628, § 19; 20 P. S. § 2833.

[6] Act of June 14, 1836, P. L. 628 § 14; 20 P. S. § 2925.

[7] "All trustees of estates . . . may hereafter, triennially, from the date of their appointment, file their accounts in the appropriate courts, which shall be duly audited, and confirmed absolutely to that date: . . . provided further, That due and actual notice shall have been given, where the account shall be filed by a trustee, to all persons interested in the estate, under the terms and provisions of the trust; . . . and that advertisement shall have been duly made of the filing of said account; and that such persons, actually notified, are legally competent and qualified, either personally or by their guardians, to appear in court and object to said account if they so desire." Act of May 3, 1909, P. L. 391, § 1; 20 P. S. § 2853.

trustee,[8] to require him to take over from the trust investments improperly made and to restore the amount expended for them to the trust estate,[9] to surcharge him with losses incurred, to allow him his proper expenses, to find against him a balance due the estate, and to make the balance found due a lien upon his real estate.[10] In the case of a continuing trust such as that here in question, after adjudication, the corpus is reawarded to the trustee for further administration in accordance with the terms of the trust. In the case of an account filed at the close of administration the court has power to decree distribution to the parties entitled. Under the equity powers conferred upon it the court may enforce its orders against a trustee by attachment for contempt.[11] The jurisdiction extends to a trust like the present created by deed or voluntary agreement.[12] The audit and confirmation of the account is to be had after advertisement and other forms of notice and is binding on all those anywise interested in the estate who have had the required statutory notice of the audit.[13] The parties in interest are permitted by exception and objection to the account to raise all pertinent questions respecting the management of the trust, and to invoke the powers of the court over the subjects above mentioned.[14] The audit will further disclose whether there be probable ground for the removal of the trustee and the appointment of another in his place and if that be done the court has jurisdiction to compel the removed trustee to transfer the trust assets to his successor.

It is obvious that the filing of their account on July 7, 1930, subjected the respondents, as the trustees then in office, to the exercise of the powers thus conferred upon the Court of Common Pleas.

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[8] Act of June 14, 1836, P. L. 628, § 29; 20 P. S. 2271.

[9] See the opinion below, 329 Pa. 512.

[10] Act of April 30, 1855, P. L. 386 § 1; 20 P. S. § 2854.

[11] Chew's Appeal, 44 Pa. 247; Scott v. Jailer, 1 Grant 237; Morrison v. Blake (No. 1) 33 Pa. Super. Ct. 290, 297; Commonwealth v. Heston, 293 Pa. 63, 68.

[12] See Baskin's App., 34 Pa. 272; Jones' Est., 15 Pa. Dist. Rep. 30; In re Weiser Trust, 23 York 80; Ball's Est., 220 Pa. 399.

[13] The petitioners lay stress on an averment in the answer filed in the Common Pleas Court to the trustees' petition for a rule to show cause why the petitioners should not be restrained from prosecuting their suit in the federal court. This is to the effect that the trustees' accounts had been "filed without notice to the" petitioners. No notice of the intention to file is required. Notice is to be given to the parties in interest that the account has been filed and will be audited. There is no averment that the beneficiaries of the trust did not receive such notice.

[14] Compare Moore's App., 10 Pa. 435; McLellan's App. (No. 1), 76 Pa. 231; Comm. v. Trout, 76 Pa. 379.

We turn to the suit instituted in the District Court to ascertain what relief was there sought. In the bill as originally filed sundry investments made by the trustees were attacked and they were charged with mismanagement of the estate. The prayers were that they be cited to file an account of the trust; that they be removed; that all trustees under the agreement be required to give bond for the faithful performance of their duties; and for general relief. By the amended bill additional trust investments were attacked. New prayers were substituted asking that the defendants be required to answer, to restore to the trust funds the moneys lost by their illegal and negligent conduct; that they be removed; that all trustees be required to give bond; and for general relief.

The plaintiffs in the District Court were but two of the five cestuis. One of the others has appeared in the Common Pleas proceeding and excepted to the trustees' accounts. Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other.[15] On the other hand, if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other.[16] We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property.[17] The doctrine is necessary to the harmonious cooperation of federal

[15] Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 195, and cited cases.

[16] *Ibid.*

[17] Farmers' Loan & T. Co. v. Lake Street E. R. R. Co., 177 U. S. 51, 61; Palmer v. Texas, 212 U. S. 118, 129; United States v. Bank of New York &c. Co., 296 U. S. 463, 477.

and state tribunals.[18] While it has no application to a case in a federal court based upon diversity of citizenship, wherein the plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in the possession of a state court,[19] this is not such a case. No question is presented in the federal court as to the right of any person to participate in the fund or as to the quantum of his interest in it. The contentions are solely as to administration and restoration of corpus.

Petitioners insist that *Shelby* v. *Bacon*, 10 How. 56, is conclusive that, under the law of Pennsylvania, the filing of an account on July 7, 1930, did not constitute the institution of a suit by the trustees, did not confer exclusive jurisdiction on the state court and did not bar the subsequent institution of a suit in the federal court for the same relief. In this we think they are in error. What was there said by this court to the effect that the filing of an account in the state court did not constitute a suit and did not confer jurisdiction on the state court, was not necessary to the decision and is not in accord with the law of Pennsylvania as declared by its own Supreme Court.[20] Assuming, however, that the state court had jurisdiction, this court held merely that the plaintiff had a right to establish his claim by suit in the Circuit Court notwithstanding the State court's jurisdiction over the trust. The court was careful to say that it was unnecessary to consider questions which might arise in the exercise of the jurisdiction of the federal court. The decision is in entire accord with many cases which hold that an action in the federal court to establish the validity or the amount of a claim constitutes no interference with a state court's possession or control of a res.

The Common Pleas Court could not effectively exercise the jurisdiction vested in it, without a substantial measure of control of the trust funds. Its proceedings are, as the court below held, quasi in rem, and the jurisdiction acquired upon the filing of the trustees' account is exclusive. The District Court for the Western District of Pennsylvania is without jurisdiction of the suit subsequently brought for the same relief, and the petitioners were properly enjoined from further proceeding in that court.

The judgment is affirmed.

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[18] United States v. Bank of New York & Trust Co., *supra*, 478, and cases cited.

[19] Commonwealth Trust Co. v. Bradford, 297 U. S. 613, 619, and cases cited.

[20] Whitney's Appeal, 22 Pa. 500, 505.